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NO. 81-148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Respondent,

v.

BILL M. MARTIN,
Petitioner.

On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Brief of Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in not reversing the trial court's refusal to allow petitioner's post-verdict request to question the trial jury foreman and/or the other about public statements made by the jury foreman representing his hostile attitude and that of the other jurors toward the trial judge with the resultant prejudice against the defendant, when the jury foreman made several post-verdict statements to the news media reflecting a very hostile and vindictive attitude toward the trial judge because of his dismissal of various counts of the Indictment against the defendant.

2. Whether the Court of Appeals erred in not reversing the trial court's refusal to grant a new trial where the evidence pertaining to eleven counts of an Indictment which were subsequently dismissed was presented to the jury and commingled into the evidence on the one count not dismissed, thus creating highly prejudicial confusion in the minds of the jurors to the detriment of the defendant.

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TENTH CIRCUIT COURT OF APPEALS OPINION

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported but it is reprinted as Appendix A to this petition.

GROUNDS FOR JURISDICTION

The date of the judgment rendered by the United States Court of Appeals for the Tenth Circuit was January 8, 1981. A petition for rehearing was denied on June 10, 1981. The statutory provision of the United States Code which allows this appeal is 28 U.S.C. §1254(1).

STATUTES

The petitioner appeals from a guilty verdict on one count of an Indictment which is based upon 18 U.S.C. §1014 and §2.

STATEMENT OF THE CASE

Proceedings in the Trial Court

On October 5, 1978, the petitioner was charged in a twelve count Indictment by a Grand Jury convened in the United States District Court for the Northern District of Oklahoma. The petitioner entered pleas of not guilty to the twelve counts on October 12, 1978. Due to drafting errors by the Government in the first Indictment, the petitioner was reindicted on November 8, 1978. On November 28, 1978, the petitioner entered pleas of not guilty to the twelve counts of the second Indictment. At that time, the first Indictment was dismissed.

On January 9, 1979, a jury was empaneled to consider evidence against the petitioner in the twelve count Indictment. The counts of the Indictment were based upon 18 U.S.C. §656, §1014, and §2.

At the close of the Government's case in chief, the trial court, after hearing arguments of counsel outside the presence of the jury, entered orders of acquittal on Counts 1, 3, 4, 5, 8, 9, 10 and 12 of the Indictment. Thereafter, at the close of petitioner's evidence, and after hearing arguments of counsel outside of the presence of the jury, the trial court sustained the petitioner's renewed motion for judgment of acquittal with regard to Counts 6 and 11.

On February 6, 1979, the jury returned a guilty verdict on Counts 2 and 7. Petitioner's counsel reviewed and reargued his motions for judgment of acquittal with regard to Counts 2 and 7 on February 6, 1979. The trial court then entered a judgment of acquittal not withstanding the verdict on Count 7 of the Indictment and took the motion under advisement with regard to Count 2.

On February 26, 1979, the trial court suffered a relapse of an illness which he had suffered during the course of the trial and died prior to the ruling on petitioner's remaining motion for judgment for acquittal. The case was then reassigned to another District Judge and on August 1, 1979, the successor District Judge entered an order overruling the petitioner's motion for judgment acquittal on Count 2 of the Indictment.

On August 31, 1979, petitioner's motion for new trial on Count 2 was overruled. The petitioner was sentenced to serve fourteen months in the custody of the Attorney General of the United States and fined $2,000.00 on Count 2 of the Indictment. The execution of this sentence was stayed by the District Court pending appeal.

Proceedings in the Court of Appeals

The petitioner timely appealed the judgment of the trial court to the United States Court of Appeals for the Tenth Circuit. On January 8, 1981, the Court of Appeals affirmed the trial court in an unpublished opinion (Appendix A).

The petitioner timely filed for a rehearing before the Court of Appeals. On June 10, 1981, the Court of Appeals denied the petitioner's request for rehearing.

The execution of petitioner's sentence has been stayed by the United States Court of Appeals for the Tenth Circuit pending notification of the receipt of this petition by this Honorable Court.

REASONS FOR GRANTING THE WRIT

Questioning of Jurors

It is respectfully and urgently requested that this Honorable Court clarify and define specific guidelines with regard to when a counsel for a defendant may approach and question a juror after a verdict has been returned when there are strong indications that improper and prejudicial considerations may have entered into the jury's verdict. On two occasions, the petitioner filed motions for judgment of acquittal based upon newspaper articles citing statements of the jury foreman expressing displeasure with the trial court's handling of the case. (See Appendices E and F). The jury foreman's statements included such quotations as:

> "I have never seen a more biased proceeding."
>
> "A lot of country judges used to look at labor as a Loch Ness monster and they'd give all sorts of weight to the other side. And yet, when I look back on them, they always gave a much more unbiased proceeding than Judge Barrow did."
>
> "I don't believe I want to serve in that courtroom again . . . my animosity might cause me to be prejudiced."
>
> "I have serious doubts whether I could reach an honest decision in that Court."

The articles further read that the foreman had contacted other jurors and "they also are angry" and that the jury found that it was "extremely difficult for us to understand what happened".

Counsel for petitioner then requested that he be allowed to question the jurors as to the statements made by the foreman. The successor trial judge stated that:

> " — Under the Rules no contact can be made

with the jurors without prior permission and authority of the Court. It is the Court's feeling that this should be denied. I have a pretty strong feeling that absent special and compelling circumstances jurors should not be called upon to search their own reactions to determine why they came to a conclusion in the confines of their deliberation room. There is sanctity in that room. There is sanctity in the deliberative process that a jury goes through and we should not invade that sanctity. I am having increasing requests for permission to visit with the jurors, some say for the purpose of determining how the attorney did, how the presentation went, to better their trial skills. There are other ways to do that and I strongly believe that jurors should not be called upon — sometimes their determinations are not based upon articulated thinking and when called to do it it, I think, invades the jury process.

So, your request to visit with the jurors will be denied. — " (Transcript of August 24 and 31, 1979 Proceedings, pages 21-22).

Rule 33 of the Rules of the District Court for the Northern District of Oklahoma requires Court approval before approaching a juror after the completion of the case. However, Disciplinary Rule 7-108 of the American Bar Association Canons of Professional Responsibility does not prohibit the contacting of a juror except to avoid harassment or embarrassment. Guidance is requested from this Honorable Court with regard to when a juror may be contacted. A problem of equal protection arises between the application of the same rule in different districts of Oklahoma. The attitude of the District Court for the Northern District of Oklahoma is clear by the statements of the District Court in this case. However, while the same rule is in effect for the Western District of Oklahoma the application of the rule there is

considerably different. For example, a request was made to the District Court to visit with the jurors in a 1979 case in the Western District of Oklahoma. (See Appendix H). The stated purpose of the request was to ". . . discern which trial tactics or maneuvers were particularly impressive to the jurors and which were particularly unimpressive." The District Court in the Western District granted that request. (See Appendix I).

The request granted in the Western District of Oklahoma was for a purpose which the trial court in petitioner's case said was improper.

We therefore have, in effect, in two Oklahoma districts, not a question of "discretion", but rather a difference between two absolutes - in the Western District counsel may apparently always question the jurors and in the Northern District counsel apparently may never question the jurors since there would be no more " special and compelling circumstances" than were presented in this case!

The lack of guidelines in the area of post-trial juror contact provides an area of definite need for this Honorable Court to provide specific parameters to guide counsel and the District Courts in situations where legitimate questions as to the conduct and prejudicial attitute of jurors arises.

In this case, it is crucial for the determination of whether this petitioner received a fair and impartial trial, to know whether the attitude of the jury foreman and the other jurors toward the trial judge tainted their deliberations on the counts which were submitted to them for determination. If the foreman's animosity toward the trial judge caused him, as he publicly stated, to be prejudiced in the future, it surely would have caused him to be prejudiced in this case against the petitioner.

It is respectfully suggested that the interview of jurors under such circumstances, as in this case, could be conducted in the District Court's conference room and under the supervision of personnel of the District Court in

order to prevent any possible abuse of a juror under an order permitting questioning of the juror when there are circumstances warranting such an order as are present in this case.

"Spillover" or "Flooding" of Evidence

In addition to the exigent need for guidelines as to when counsel for a defendant may contact a juror, it is respectfully submitted to this Honorable Court that reasonable definition as to the limits of "spillover" or the "flooding" of evidence from a multiplicity of counts is also urgently needed. In a situation such as in the present case where many counts are involved in an indictment, and during the course of the trial several counts are dismissed by the trial court for various reasons, it becomes more and more difficult for a jury to filter all of the evidence presented on all of the counts to just one or two remaining counts. This Honorable Court, it is respectfully suggested, should focus on this problem and provide a clear set of guidelines which can be applied in the future by the District Courts to criminal cases.

In the present case, ten of the twelve counts against the petitioner were disposed of before the jury began its deliberation on the two remaining counts. However, the impact upon the jury of the evidence presented on the ten counts is clearly prejudicial. *Fotry-five* exhibits were introduced by the Government in support of the ten dismissed counts and *only four* related to the counts that were submitted to the jury. The total evidence submitted to the jury in the almost month long trial was in approximately the same proportions - over 90% of the evidence submitted to the jury pertained to counts that were dismissed! Due to the fact that counsel for the petitioner could in no way anticipate the evidence which would be presented by the Government during the course of the trial, a motion to sever or a challenge to joinder under Rule 14 of the Federal Rules of Criminal Procedure was, for all practical purposes inapplicable. *United*

States v. Mandel, 415 F.Supp. 1033 (D.Md. 1976).

The Court of Appeals in its opinion in petitioner's case, stated that: "There is no reason advanced why the jury could not relate the proof to the courts." However, this conclusion is clearly erroneous as evidenced by the trial court's judgment of acquittal notwithstanding the verdict on Count 7 of the Indictment and the statements of the prosecutor in his closing argument.

Furthermore, the statements by the prosecutor in his closing argument vividly illustrate the "flooding" problem. Those remarks should have been limited to the two counts then before the jury pertaining to the alleged submission to one bank of one document. The continued reference by the prosecutor to the evidence presented on all twelve of the counts must certainly have created confusion in the minds of the jury. For example, this conclusion is reflected by these types of statements by the prosecutor dealing with the totality of the evidence:

> "... relating to new facts ... so that you would get a total picture as to what took place over a two-year period this indictment covered ..." (TR 887).
>
> "How much did he really get from all of these investors" (TR 931).
>
> "I have yet to hear one witness say Mr. Martin did not commit these criminal acts as charged in the case." (TR 928).
>
> "When financial empire crumbles ... had a ball club, owned the Tulsalite Magazine, controlling interest in three banks." (TR 889).
>
> "... he became involved with three banks and had plans to buy more." (TR 928).
>
> "... assigning over all his assets except his house and his car? ... Why did he sign it? ... he admitted that he had done wrong." (TR 928).

It is obvious that even the Government attorney was

having much difficulty in separating the evidence of the ten dismissed counts from the evidence on the two counts remaining before the jury.

If the Government attorney could not separate the evidence of the ten dismissed from the two remaining counts, how then can one expect the jurors to disregard the evidence of the ten dismissed counts from the then two remaining counts! This is reinforced by the fact that there *was no evidence* to support Count 7, since the single submission of the same document was alleged to support both Counts 2 and 7 and Count 7 was alleged to have taken place a year later! It was for this reason the trial court had to subsequently dismiss Count 7.

The "flooding" of evidence from dismissed counts must at some point contaminate counts that are presented to a jury for its deliberation. When the "flooding" becomes prejudicial, a defendant cannot be rendered a fair and impartial jury trial. In the present case, the "flooding" was devastating in that the jury could in no way separate the evidence on Counts 2 and 7 from the counts which were not before the jury for consideration, regardless of the court's instructions. The subsequent dismissal of Count 7 by the trial court reinforces the conclusion that the "flooding" problem must be defined and guarded against. It a defendant is to be convicted, he must be convicted upon the evidence of the particular charges and not from extrinsic and prejudicial evidence presented on other dismissed counts which have no relation to the submission to the jury. *United States v. Foutz*, 540 F.2d 133 (4th Cir. 1976).

The treatment and the defining of guidelines by this Honorable Court of the "spillover" of "flooding" effect of evidence presented to a jury on counts of an indictment which are subsequently dismissed, regardless of instructions to the jury endeavoring to disregard the "spillover" or "flooding" effect will define and guide both counsel and the trial courts in the proper presentation of evidence to a jury.

CONCLUSION

These two issues presented to this Honorable Court in this Petition for Writ of Certiorari are unique and illustrate areas of serious difficulty which are urgently in need of guidance by this Honorable Court and, based upon the facts of this case, such guidance will clearly benefit the judicial justice system of the United States.

Respectfully submitted,

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